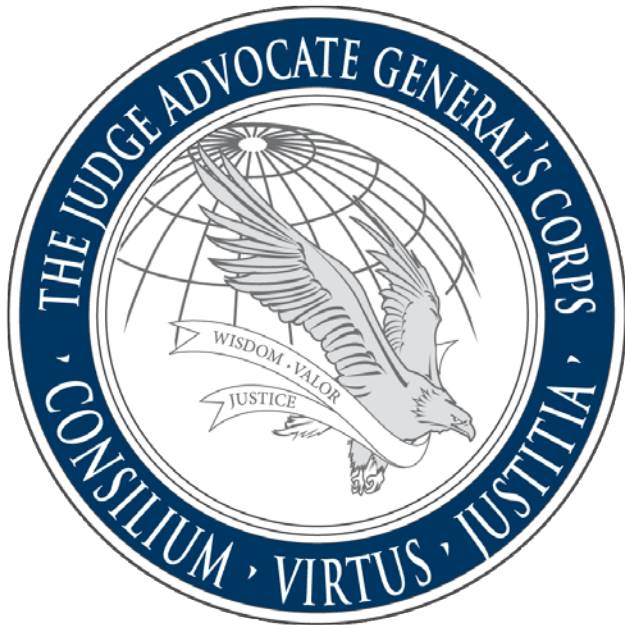


Environment, Energy Security & Sustainability Symposium

PL 111-378 and Payment of CWA Stormwater Fees



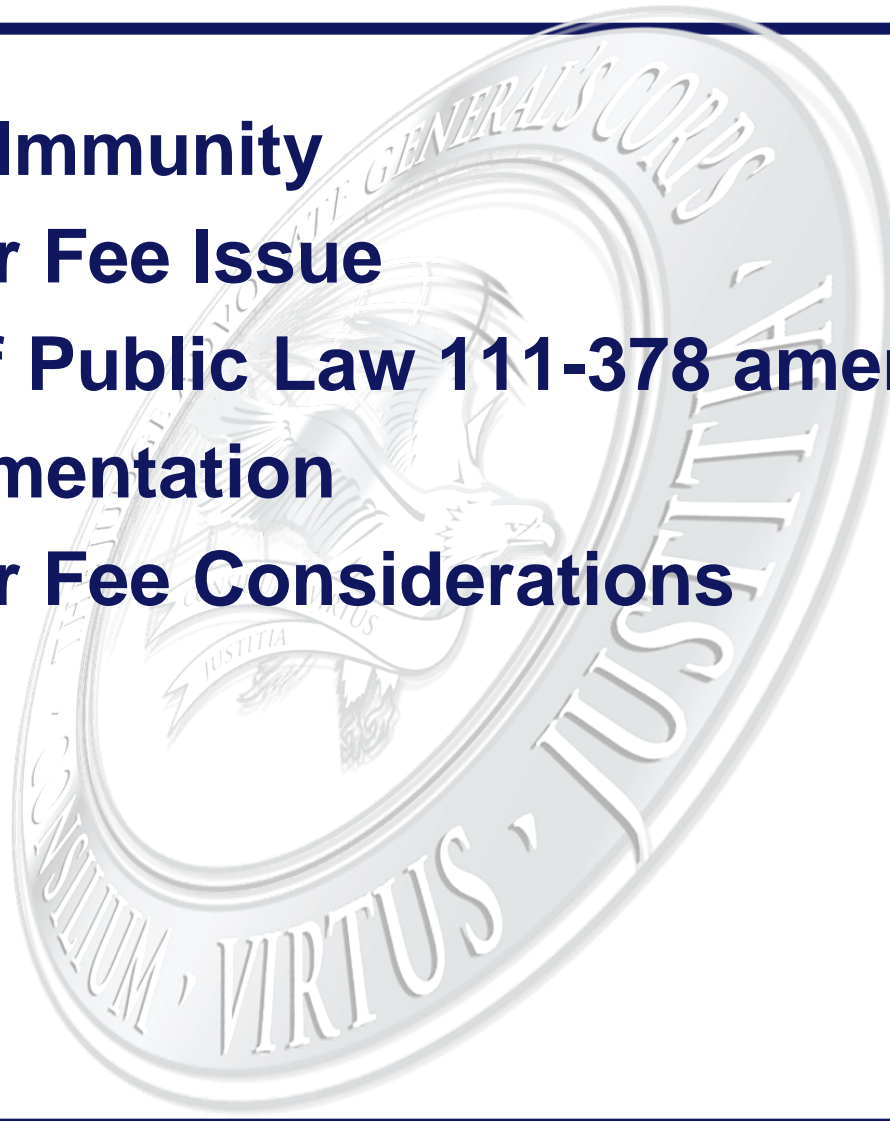
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Overview

- **Sovereign Immunity**
- **Stormwater Fee Issue**
- **Passage of Public Law 111-378 amending CWA**
- **DoD Implementation**
- **Stormwater Fee Considerations**





Sovereign Immunity and the Clean Water Act (CWA)

- **Federal sovereign immunity – the United States is only subject to those laws that Congress consents to**
- **CWA limited waiver of sovereign immunity**
 - **Federal facilities must comply with all Federal, state, interstate, and local water pollution control and abatement requirements**
 - **Includes payment of reasonable service charges**





Development of Stormwater Fees Issue

- **Local government assessment of stormwater fees against those within jurisdiction (often based on impervious surface calculations)**
- **Stormwater fees may create fee/tax and fiscal law issues for federal agencies**
- **Government Accountability Office (GAO) opinions on Washington, DC stormwater fees**





Public Law 111-378

- **Public Law 111-378 signed 4 Jan 2011**
 - **“Federal Responsibility To Pay for Stormwater Programs”**
 - **Amendment to CWA § 313 (“Federal Facilities Pollution Control”)**
 - **Revised waiver of sovereign immunity to allow payment of certain stormwater fees as reasonable service charges**
 - **O&M funds may be used to pay appropriate fees (after DOJ/OLC opinion)**
-



Elements of CWA § 313(c) Reasonable Service Charge

- relate to the control and abatement of water pollution;
 - reasonable;
 - nondiscriminatory;
 - based on fair approximation of the proportionate contribution of the property or facility to stormwater pollution;
 - measured in quantities of pollutants, volume or rate of stormwater discharge or runoff from the property or facility;
 - used to pay or reimburse the costs associated with any stormwater management program; and
 - may include the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge; regardless of whether that reasonable fee, charge, or assessment is denominated a tax
-



DoD Approach to Stormwater Fees

- DoD Components have been working closely to cross-feed information on stormwater fees
- OSD GC guidance on use of O&M appropriations and criteria to consider when evaluating fees/charges
- Request additional information from locality
- Negotiations with locality
- Determination of appropriateness of assessed fees
- If payment not appropriate, notify chain of command





Considerations in Analysis of Stormwater Fees

- **Is the DoD installation regulated under a Municipal Separate Storm Sewer System (MS4) Permit?**
- **Is all property in the jurisdiction subject to fees and are fees calculated similarly?**
- **For what purpose are the proceeds of the fees used?**
- **How is the fee calculated?**
- **To what extent does the installation contribute stormwater to the locality's stormwater system?**
- **Are there credits/reductions available for stormwater management practices at the DoD installation?**

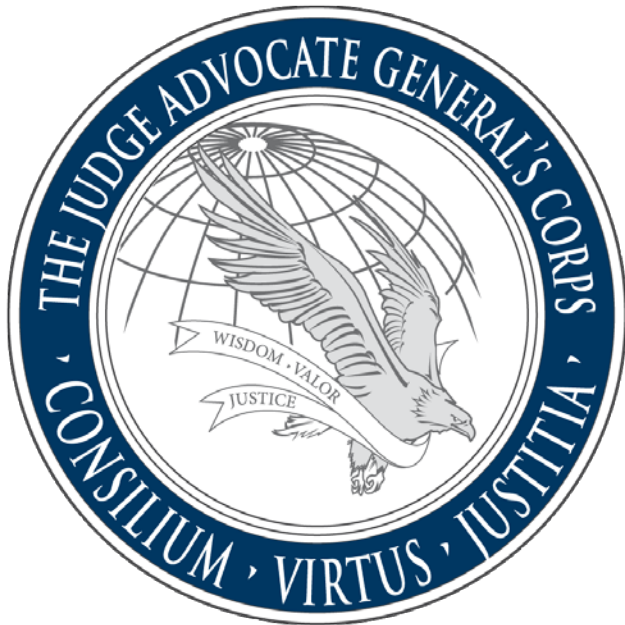


Summary

- **Amendment to CWA waives sovereign immunity allowing payment of certain reasonable stormwater fees by federal agencies**
- **Analysis of fees is fact-specific based on unique installation stormwater characteristics/management and locality fee assessment mechanism**
- **Communication with the locality will be key**

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Questions?



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